

Disease-i

Welcome to October's 2017 edition of Disease-i; the publication for busy disease practitioners!

We always enjoy hearing from our readers, so if you have any suggestions for topics or experiences to share, please email us at jim.byard@weightmans.com.

The market place

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- Air quality targets are being missed
- Oxford to become first UK city to ban all polluting vehicles
- PPO approved for cancer treatment
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- Silent Night halts production after mattress carcinogen warning



The market place

Introduction

The month has been largely dominated by the growing awareness of air pollution as a contributor to adverse health impacts in the UK. We report three stories here which are linked to the issue.

Pollution linked to 50,000 deaths annually in the UK

The Lancet Commission Report (19.10.17) now implicates air pollution, including industrial pollution, in 50,000 deaths in the UK annually which is an increase from the figure of 40,000 deaths estimated in The Royal College of Physicians report of February 2016. The UK is described as having the second highest mortality rate in Western Europe due to air pollution. Belgium is the only country with a higher mortality rate.

Air quality targets are being missed

Government statistics have shown that 278 out of 391 local authorities have declared Air Quality Management Areas. This is up from 258 in 2010. An Air Quality Management Area means that the air quality objectives are not, or are unlikely to be met. The Planner reports that *“Environmental lawyers ClientEarth, which brought the [previous] two challenges, has now written to the government complaining that 45 authorities are not being required to take action to achieve air quality standards despite being forecast to breach air pollution limits. It is threatening to go back to court a third time.”*

Oxford to become first UK city to ban all polluting vehicles

Oxford City Council and Oxfordshire County Council have published joint proposals which would see Oxford become the first city in the world with a zero emissions zone. The plans, which are now under consultation, would eventually lead to a ban on all non-electric vehicles in the city centre by 2035. The proposals would tackle the city's rising pollution levels with nitrogen dioxide having risen above legal limits in some parts of the historic city. Councillor John Tanner of Oxford City Council said: *“[t]oxic and illegal air pollution in the city centre is damaging the health of Oxford's residents. A step change is urgently needed; the zero emissions zone is that step change”*. The plans would first introduce a ban on non-zero-emissions taxis, cars and light commercial vehicles and buses from using a small number of the city's streets in 2020. This ban would then transition towards the full ban by 2035 which would affect all vehicles including taxis and HGVs. The plans would be facilitated by £1.3 million in Government funding, which the council has secured to install electric charging points for both taxis and residents.

PPO approved for cancer treatment

The claimant alleged exposure to asbestos during his work with John Atkinson & Sons Limited. It was alleged that the claimant had been working with asbestos insulation board sheets which were hand cut to size and during this process the dust was created and would linger. The claimant subsequently developed mesothelioma and as part of the settlement, the defendant agreed to pay for the future costs of the claimant's cancer treatment. A deferred periodical payments order (“PPO”) was agreed which avoids the need to provide estimated treatment costs but also reflects the realistic risk of immunotherapy being required at a future date. The PPO would not be brought into effect until such time as the claimant's oncologist recommended the commencement of the treatment. It is at that stage that the price could be calculated. Jeremy Roussak, Junior counsel instructed for the claimant said *“It is pleasing to see that the insurers involved in this case have taken the pragmatic step of agreeing a form of PPO. If this agreement is used regularly, it will help both sides involved in asbestos litigation. Victims will be given the assurance that should they need immunotherapy or biological therapy in the future then the funds will be made available for it indefinitely. Insurers will benefit from it*

because it will save them from making any payments at the time of settlement towards the anticipated costs of immunotherapy which may never in fact occur if the victim is not considered suitable for it."

Easyjet announces plans to install new cabin filtration system in response to 'health concerns'

Easyjet has announced that it is working to fit its planes with a new air filtration system in response to "health concerns". In a statement the airlines said that *"Easyjet is working with Pall Corporation to identify and reduce incidents of unusual smell and fumes in the cabin. These events can have short term effects on health and can lead to flight disruption"*. The announcement has been viewed as a "passive acknowledgement" of the existence of 'aerotoxic syndrome', a combination of health issues which some air crew and passengers have claimed are caused by breathing in contaminated cabin air. During a flight, passengers and crew breathe a mixture of recycled cabin air and 'bleed air' which is drawn in unfiltered to the air circulation system from the engines. It has been alleged that this 'bleed air' can become contaminated with engine oil and hydraulic fluids and has been linked to cancer, chronic fatigue and neurological problems by a report published in the World Health Organisation's journal.

Airlines have however fiercely rejected claims of the syndrome's existence and cite independent studies which have found that bleed air has no links to long-term health effects. The Civil Aviation Authority has also continued to dispute the claims but has conceded that such a link *"cannot be ruled out"*. Easyjet also continues to deny links to long-term health effects or 'aerotoxic syndrome' and commented that the new filtration system was not related to recent reports but was only an attempt to eliminate short term health effects and disruption.

Commentary:

Aerotoxicity is a controversial issue and doubtless this action will be seized upon by some observers as implicit recognition of its existence and of the potential for it to cause adverse health effects.

Fine for council which failed to prevent vibration syndrome

Wrexham County Borough Council has been fined £150,000 for its failure to prevent an employee from developing Hand Arm Vibration Syndrome (HAVS). The employee, a 57-year old man, was diagnosed with HAVS in September 2015 after working in the Council's StreetScene department. The Health and Safety Executive found that the Council had failed to address issues relating to the prevention of HAVS which had been raised following an audit in February 2011. None of the policies developed by the Council were implemented to protect workers. The Council pleaded guilty to breaching the Health and Safety at Work Act 1974 and was ordered to pay £10,901 in costs in addition to the £150,000 fine.

Commentary:

This is one of a number of successful prosecutions brought against employers for failing to address the issue of HAVS in the workplace.

Case law update

Unusual Tinnitus

“I hear bagpipes in my head” was the claim made by the comedian and keen ornithologist Bill Oddie– as reported by The Sunday Express (22nd October)

Mr Oddie is reported to describe his tinnitus as follows;

“It varies quite a bit and it is difficult to distinguish a tune but nearly every day it involves a bagpipe solo.”

Mr Oddie invites readers to advise whether they have similar experiences. For our part having reviewed thousands of ENT Reports in the context of NIHL, the experience strikes us as unique, but we welcome any differing observations by readers of Disease I/

Loss of society awards

Manson v Henry Robb Ltd [2017] CSOH 126

George Aberdeen Manson (“deceased”) had worked for the defenders during his early career. It was alleged by the deceased’s wife and two sons (the pursuers), that as a result of the deceased’s exposure to asbestos dust and particles during his employment with the defenders, the deceased had developed epithelioid mesothelioma of the pleura, leading to his death on 12 February 2016 when the deceased was 80 years old. Liability was admitted by the defenders and the case proceeded for a Proof on quantum only. The first two pursuers were the deceased’s two sons aged 59 and 55 years respectively. The third pursuer was the deceased’s wife, aged 79 years old. The pursuers’ claims were for damages for loss of services provided by the deceased, statutory damages arising under the Pneumoconiosis etc. (Workers’ Compensation) Act 1979 and loss of society claims. The first and second pursuers owned the home where they lived with the third pursuer and the deceased and, during evidence, told the court that they were a very close family. The deceased was described as being very fit and active prior to his diagnosis in July 2015, working full time until he was 72 years old. The deceased had been responsible, prior to his death, for the family shopping, domestic chores, domestic financial matters and also providing care to his wife, the third pursuer. The pursuers submitted that they had lived with the deceased *en famille* until the date of his death and had formed a particularly close relationship. The court had regard to, when making a judicial award, the level of jury awards in similar cases to ensure a level of consistency between judicial awards and jury awards. Having regard to the facts of this case and the range of awards, the court ordered the defenders to pay damages to all three pursuers.

Relief from sanctions for late service of Particulars of Claim

Chelsea Bridge Apartments v Old Street Homes Ltd 4 September 2017

Deputy Master Cousins refused to grant relief from sanctions and refused to extend time for claimants to file and serve their Particulars of Claim. The Particulars of Claim had been served at least three months late and there had been no application to extend time made for over two months. Applying *Denton*, this was a serious and significant failure. Applying the second stage of *Denton*, the claimants had provided inadequate reasons for their serious and substantial default and applying the third stage of *Denton*, the claimants had not conducted the litigation efficiently or at proportionate cost. In the exercise of its discretionary power under 3.1(2)(a) to extend time for compliance, the court was entitled to refuse to grant an extension of time for service of the Particulars of Claim.

Late acceptance of a Part 36 and indemnity costs

Whalley v Advantage Insurance Co Ltd County Court (Kingston upon Hull) 5 October 2017

In a complete u–turn from his decision in *Sutherland v Khan*, DJ Besford has held that his conclusion in *Sutherland* that indemnity costs could be ordered even where there was no finding that the defendant was guilty of inappropriate behaviour, was unsupported and could no longer stand. Unless there were ‘exceptional circumstances’ in accordance with 45.29J, then the claimant would only be entitled to fixed costs following the late acceptance of a Part 36 in a case to which fixed costs otherwise applied.

On the horizon

Number of women suing Johnson & Johnson over baby powder rises to 4,800

It has recently been reported that the number of women suing Johnson & Johnson alleging that talcum particles caused ovarian cancer has risen to 4,800. However, there is no class action; instead, the claims are being litigated separately, perhaps with the expectation that there will eventually be a mass payout. As well as compensation, many claimants are seeking an order that Johnson & Johnson have to add a warning label to their baby powder or reformulate the product with corn starch. According to the New York Times *“Johnson & Johnson has lost six of the seven cases decided so far. A New Jersey state court judge dismissed two other complaints last year before they reached trial, ruling that the plaintiffs lacked credible scientific evidence.”*

Study finds link between artificial light and breast cancer

A study from Harvard T.H Chan School of Public Health looking at 110,000 women between 1989–2013 has demonstrated a correlation between women who live in areas which have high levels of outdoor lighting at night and an increased risk of breast cancer. Women with the top 20% level of exposure had an estimated 14% increased risk of breast cancer when compared to women in the bottom 20% of exposure.

Peter James, an assistant professor at Harvard Medical School’s Department of Population Medicine and the lead author of the study, said: *“In our modern industrialised society, artificial lighting is nearly ubiquitous. Our results suggest that this widespread exposure to outdoor lights during night time hours could represent a novel risk factor for breast cancer.”*

Midlife hearing loss accounts for 9% of dementia risk

In a report presented at the Alzheimer’s Association International Conference in London, the top modifiable risk factor for dementia was revealed. Midlife hearing loss accounted for 9% of the risk of dementia across global population. The reasons for the connection between hearing loss and cognitive decline are not clear-cut; it has been suggested that hearing loss may lead to social isolation which is another risk factor for dementia.

Silent Night halts production after mattress carcinogen warning

Silent Night has had to halt mattress production at their factories after being informed by BASGF (a German chemical company) that there was a risk of excessive levels of a carcinogenic ingredient in their foam mattresses following a technical error. A spokesperson for Silent Night has stated that *“[f]ollowing this thorough investigation, we can confirm that there has been no impact whatsoever on the quality or safety of any products manufactured at our Silentnight Group sites.”*

For further information about Weightmans LLP or to discuss any of the issues in this newsletter, please contact:

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